# United States Department of Labor
# Employees' Compensation Appeals Board

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| **ALLAN N. SANDELSTEIN, Appellant** | ) | |
| **and** | ) | **Docket No. 04-804** |
| | ) | **Issued: September 28, 2004** |
| **U.S. POSTAL SERVICE, AIRPORT MAIL FACILITY, Miami, FL, Employer** | ) | |

*Appearances:*
*Allan N. Sandelstein, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

### ***JURISDICTION***

On February 6, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated August 19, 2003, which terminated his wage-loss compensation benefits on the grounds that he refused an offer of suitable work. The record also contains decisions dated October 17, November 24 and December 10, 2003[1] denying appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit termination decision and the nonmerit decisions in this case.

[1] On December 14, 2003 appellant requested reconsideration of the December 10, 2003 nonmerit decision. The record also contains an Office decision dated February 6, 2004 denying appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The Board notes that this decision is null and void as the Office and the Board may not have concurrent jurisdiction over the same issue in a case. *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

## ***ISSUES***

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation effective August 19, 2003, under section 8106(c) of the Federal Employees' Compensation Act, on the grounds that he refused an offer of suitable work; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## ***FACTUAL HISTORY***

On January 11, 1987 appellant, a 43-year-old express mail clerk, filed a traumatic injury claim alleging that he injured his back on December 30, 1986 when he slipped and fell at a bus stop. The Office accepted the claim for low back strain and herniated disc at L3-4 and subsequently expanded the claim to include bulging discs at L3-4, L4-5 and L5-S1. Appellant stopped work on January 12, 1987 and was placed on the periodic rolls for receipt of total disability.

By decision dated October 5, 1994, the Office terminated appellant's compensation benefits on the grounds that he no longer had any residuals due to his accepted December 30, 1986 employment injury. On July 5, 1995 an Office hearing representative affirmed the termination of benefits. Appellant subsequently filed multiple reconsideration requests, which the Office denied. On September 30, 1996 the Board issued an order dismissing his appeal at appellant's request.[2] On March 11, 2002 the Office granted appellant's reconsideration request and changed the accepted condition from herniated lumbar disc to bulging lumbar discs at L3-4, L4-5 and L5-S1. The Office found the weight of the medical evidence established that he had residuals due to his accepted employment injury and enclosed CA-7 and CA-1032 forms to complete to obtain additional wage-loss compensation.

On August 8, 2002 the Office referred appellant, together with a statement of accepted facts, questions to be answered and the medical record, to Dr. Glenn R. Rechtine, II, a Board-certified orthopedic surgeon, selected as an impartial medical specialist. The Office found a conflict in the medical opinion evidence between Dr. Steven J. Lancaster, a second opinion Board-certified orthopedic surgeon, and Dr. Hubert L. Rosomoff, an attending Board-certified neurological surgeon, as to appellant's ability to return to work.

In a report dated October 18, 2002, Dr. Rechtine diagnosed a neck sprain, lumbar disc displacement, spondylolisthesis, myalgia and myositis. A physical examination revealed restricted extension, flexion, lateral bending and rotation of the neck, inability "to heel to toe walk due to poor balance," bilateral negative Spurling's test, bilateral negative straight leg raising, and abnormal cervical spine range of motion and abnormal lumbar spine range of motion secondary to pain. Based upon a review of x-rays and magnetic resonance imaging (MRI) scans, Dr. Rechtine noted degenerative changes of the lumbar spine, "large spinal canal," L3-4 and L4-5 disc bulges with no neural impairment and degenerative changes at L1-5. With regard to the issue of appellant's ability to work, Dr. Rechtine concluded that he was capable of working eight

[2] Docket No. 96-987 (issued September 30, 1996).

hours per day with physical restrictions. The restrictions included no pushing, pulling or lifting more than 20 pounds, breaks of 2 to 5 minutes every 2 hours and operating a motor vehicle for 4 to 8 hours per day.

On March 25, 2003 the employing establishment offered appellant the position of modified distribution clerk at the Miami Airport Mail Facility. The physical requirements of the job included pulling, lifting and pushing up to 20 pounds, operating a motor vehicle between 4 and 6 hours per day, intermittent sitting, walking and standing with frequent changes and 2- to 5-minute breaks every 2 hours. In an addendum dated May 7, 2003, the employing establishment informed appellant that relocation expenses would be paid. Appellant declined the position.

In a May 14, 2003 letter, the Office advised appellant that the offered position was suitable work within his medical restrictions, as approved by Dr. Rechtine, the impartial medical examiner. The Office afforded appellant 30 days, in which to accept the job offer or submit his reasons for refusal. The Office also advised appellant of the penalty provisions of the Act for refusing suitable work.

On June 9, 2003 appellant rejected the offer of employment. In a June 27, 2003 letter, the Office advised appellant that he had 15 days, in which to either accept the offer or face termination of his compensation. The Office noted that his reasons for refusing the job offer were unacceptable and that no further reasons would be considered. Appellant requested an extension to July 30, 2003 by telephone call on July 7, 2003, which the Office granted on July 8, 2003.

In a July 15, 2003 letter, appellant contended that the objective evidence supported his injury, that he should not be forced to return to work for the employing establishment, enclosed copies of a July 8, 2003 x-ray interpretation by Dr. John Soong and a July 6, 2003 progress note signed by Margaret O. Townsend, a registered nurse. He requested an additional postponement in order to submit results of a new MRI test. In a July 29, 2003 letter, appellant requested a postponement in order to allow him to submit a report by a specialist.

By decision dated August 19, 2003, the Office terminated appellant's wage-loss compensation benefits, effective that date, on the grounds that he refused an offer of suitable work. The Office noted appellant submitted copies of a July 8, 2003 x-ray interpretation by Dr. Soong and found that appellant submitted no medical evidence establishing that the proposed duties exceeded his work restrictions.

Appellant requested reconsideration on August 26, 2003. He argued that he was unable to perform his date-of-injury position and that the Office ignored this fact. In a letter dated September 22, 2003, appellant contended that he was unable to perform the duties of the offered position and that he remained totally disabled.

By decision dated October 17, 2003, the Office denied appellant's request for reconsideration.

Appellant requested reconsideration by letter dated November 5, 2003. He contended that there was no referee opinion and thus there was "error on face of (sic) evidence."

By decision dated November 24, 2003, the Office again denied appellant's request for reconsideration.

On December 2, 2003 appellant requested reconsideration. Appellant contended that there was no mention of who the conflict was between when the Office referred him to Dr. Rechtine on the issue of his ability to work. He contended that Dr. Rechtine was not an impartial medical specialist.

By decision dated December 10, 2003, the Office denied appellant's request for reconsideration.

## ***LEGAL PRECEDENT -- ISSUE 1***

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[3] This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[4]

Under section 8106(c)(2) of the Act,[5] the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[7]

## ***ANALYSIS -- ISSUE 1***

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8] Dr. Rechtine based his report on a proper factual background and included all of appellant's physical findings in reaching his work restrictions including the conditions of spondylolisthesis, myalgia and myositis. The Board finds that Dr. Rechtine's well-reasoned report is entitled to the weight of the medical opinion evidence.

Based on the report of Dr. Rechtine, the impartial medical specialist, the employing establishment offered appellant the position of a modified distribution clerk at the Miami Airport

[3] *Linda D. Guerrero*, 54 ECAB ___ (Docket No. 03-267, issued April 28, 2003).

[4] *Juan A. Dejesus*, 54 ECAB ___ (Docket No. 03-1307, issued July 16, 2003).

[5] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[6] *Sandra K. Cummings*, 54 ECAB ___ (Docket No. 03-101, issued March 13, 2003); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[7] *Linda D. Guerrero, supra* note 1; *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[8] *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004).

Mail Facility and advised him that relocation expenses would be paid. The Office properly referred appellant to Dr. Rechtine after finding a conflict in medical evidence regarding appellant's ability to work between Dr. Rosomoff, an attending Board-certified neurological surgeon and Dr. Lancaster, a Board-certified orthopedic surgeon, who served as an Office referral physician.[9] The employing establishment offered appellant a modified position based upon the physical requirements set by Dr. Rechtine. The Board notes that the description of job duties provided on the limited-duty work offer specifically stated that he was to have a two- to five-minute break every two hours and there would be intermittent sitting, walking and standing with frequent changes. Appellant was not required to lift greater than 20 pounds as specified by Dr. Rechtine. Because the limited-duty job offer is within the work restrictions provided by Dr. Rechtine, the Office met its burden to establish that the position was suitable.

In the case of *Maggie L. Moore*, the Board held that, when the Office makes a preliminary determination of suitability and extends the employee a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of section 8106(c) without first affording the employee the opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.[10]

Because appellant was offered a suitable job, he had the burden to demonstrate that his refusal to work was justified. FECA Bulletin No. 92-19, issued on July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The bulletin provides that, if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job and advised that the Office will not consider any further reasons for refusal. If the employee does not accept the job within the 15-day period, compensation, including schedule award payments, will be terminated under section 8106(c).[11]

The Office followed these procedures and afforded appellant the protections set forth in *Moore*.[12] The Office gave appellant a reasonable opportunity to accept the offer of employment, notified him of the penalty provision of section 8106(c) and properly considered his reasons for refusing the offered job.

[9] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination."

[10] *Maggie Moore* 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[11] *See* 20 C.F.R. § 10.516-517; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d), 2.8145(d)(1) (July 1997).

[12] *C.W. Hopkins*, 47 ECAB 725 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

Appellant requested an extension to July 30, 2003 by telephone call on July 7, 2003 which the Office granted on July 8, 2003. Appellant's evidence, submitted to support his refusal, included the July 8, 2003 x-ray interpretation and the July 6, 2003 progress note by Ms. Townsend. The progress note of Ms. Townsend is not considered relevant medical evidence on the issue of appellant's ability to work because she is a nurse. The Board has held that opinions rendered by nurses are not competent to constitute a medical opinion.[13] In addition, the July 8, 2003 x-ray did not contain any medical information that would relate the findings of the x-ray to whether appellant was capable of performing the duties of the offered modified position. After reviewing this evidence, the Office, in a decision dated August 19, 2003, notified appellant that his evidence was insufficient to change the suitability determination. The Office then properly invoked the penalty provision of section 8106(c). Thus, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[14] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[16]

## ***ANALYSIS -- ISSUE 2***

In his letters dated August 26, September 22, November 5 and December 2, 2003 appellant requested reconsideration. Appellant contended that he was unable to perform the duties of the offered position and that he remained totally disabled. In the November 5, 2003 reconsideration request, he alleged an error on the grounds that there was no referee opinion. On December 2, 2003 he contended Dr. Rechtine was not an impartial physician as the Office did not identify the physician creating the conflict. Appellant has not demonstrated, in any of his reconsideration requests, that the Office erroneously applied or interpreted any error in its application of the law. As noted previously, the Board found that the Office properly selected Dr. Rechtine to resolve the conflict. Moreover, appellant did not advance a legal argument not

[13] *Vincent Holmes*, 53 ECAB ___ (Docket No. 00-2644, issued March 27, 2002) (a nurse is not a "physician" under the Act and thus cannot render a medical opinion on the causal relationship between a given physical condition and accepted employment factors).

[14] 20 C.F.R. § 10.606(b)(2) (2003).

[15] 20 C.F.R. § 10.608(b) (2003).

[16] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). Finally, regarding the third component, appellant did not submit any new medical evidence with his request for reconsideration, and thus is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's disability compensation effective August 19, 2003 because he refused an offer of suitable work. The Board also finds that Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 10, November 24, October 17 and August 19, 2003 are affirmed.

Issued: September 28, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member